

University at Buffalo School of Law

Digital Commons @ University at Buffalo School of Law

Journal Articles

Faculty Scholarship

2015

Preservation Is a Flawed Mitigation Strategy

Jessica Owley

University of Miami School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/journal_articles



Part of the [Environmental Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

Jessica Owley, *Preservation Is a Flawed Mitigation Strategy*, 42 Ecology L. Currents 101 (2015).

Available at: https://digitalcommons.law.buffalo.edu/journal_articles/178



This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Preservation Is a Flawed Mitigation Strategy

Jessica Owley*

INTRODUCTION

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. To help achieve that objective, the Act limits the ability to dredge or fill a wetland. To do so, one must first obtain a section 404 permit. These permits, which the Army Corps of Engineers ("Corps") issues with coordination and oversight from the Environmental Protection Agency (EPA), require project proponents to avoid, minimize, and compensate the harms of any wetland destruction or modification. Compensatory mitigation is a troubling concept in wetlands regulation because it acknowledges that wetland destruction will occur. Thus, instead of preventing wetland conversion, developers in this scenario compensate for wetlands lost. Compensatory mitigation can come in the form of restoration, creation, enhancement, and/or preservation of wetlands and other aquatic resources. Wetlands are preserved by prohibiting their conversion, often through property encumbrances like conservation easements and deed restrictions. This scenario exchanges preservation of certain wetlands for a right to degrade or destroy other wetlands.

This Article urges the Corps to eliminate its use of preservation as mitigation and to improve accountability mechanisms where private organizations, like land trusts and private mitigation banks, remain involved in wetlands permitting programs. As even the EPA acknowledges that preservation results in a net loss of wetlands, preservation is unlikely to compensate for the loss in ecological function from wetlands destruction. Additionally, because private land trusts commonly manage, monitor, and enforce preservation areas with little to no oversight by the Corps or the EPA, concerns of accountability and democracy arise. Although this Article focuses on the Clean Water Act's section 404 program, the arguments and lessons discussed here apply to state and local wetland mitigation programs as well.

* Associate Professor, SUNY Buffalo Law School. I am indebted to the thoughtful comments and careful consideration of this piece by Amanda Leiter, Mike Lewyn, Mike Pappas, Justin Pidot, and Julia Purdy. Nicholas Fischer provided research assistance for early stages of this project. As always, the ELQ staff provided careful editing that undoubtedly improved the piece.

Indeed, these same issues arise in all types of mitigation schemes, from endangered species habitat to prime agricultural soils.

I. THE NEED TO PROTECT WETLANDS

Beyond their aesthetic appeal, wetlands serve many ecological functions. They provide habitat to many species of plants and animals, including migratory birds and endangered species. They serve as water recharge areas, protecting lands from flooding while filtering and purifying water. Wetlands trap sediment, providing clean water for fish and reducing water filtration costs for drinking water supplies. Wetlands also carry strong cultural and emotional attachments. For example, strong Tribal, Floridian, and American attachments to the Florida Everglades (dubbed America's Swamp) spurred its restoration to become one of the most expansive and expensive in history.

Although important, wetlands are not extensive. They cover less than 9 percent of the Earth's global land area.¹ Wetlands are also at risk. For example, Louisiana wetlands are disappearing at a rate of up to ninety-one square kilometers a year—one of the world's highest rates of wetland loss.² California boasts the highest overall loss; 91 percent of its wetlands were lost by 2000.³ Pollution,⁴ sea-level rise,⁵ extreme weather events,⁶ and conversion⁷ all threaten the continued existence and health of wetlands. Converting wetlands to

1. Joy B. Zedler & Suzanne Kercher, *Wetland Resources: Status, Trends, Ecosystem Services, and Restorability*, 30 ANN. REV. ENV'T & RESOURCES 39, 39 (2005), available at <http://www.botany.wisc.edu/zedler/images/ZedlerAnnReview.pdf>.

2. Joel Bourne, *Louisiana's Vanishing Wetlands: Going, Going . . .*, 289 SCIENCE 1860, 1860 (2000), available at <http://www.sciencemag.org/content/289/5486/1860.full>. Louisiana contains 40 percent of the wetlands in the contiguous forty-eight states, and accounts for 80 percent of the current wetland loss.

3. Richard F. Ambrose, *Wetland Mitigation in the United States: Assessing the Success of Mitigation Policies*, 19 WETLANDS (AUSTRALIA) 1, 3 (2000), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2004_10_28_wetlands_ambrose_wetlandmitigationinus.pdf.

4. See Leon P.M. Lamers et al., *Differential Responses of Freshwater Wetland Soils to Sulphate Pollution*, 55 BIOGEOCHEMISTRY 87, 88 (2001) (explaining that sulfur pollution in freshwater wetlands is leading to a loss of biodiversity as sulphide resistant plant species outcompete characteristic plant species).

5. See Robert J. Nicholls, Frank M.J. Hoozemans & Marcel Marchand, *Increasing Flood Risk and Wetland Losses Due to Global Sea-Level Rise: Regional and Global Analyses*, 9 GLOBAL ENVTL. CHANGE S69, S70 (1999), available at <http://www.peconsulting.se/wp-content/uploads/2013/05/Increasing-flood-risk-and-wetland-losses-due-to-global-sea-level-rise.pdf> (explaining that sea-level rise will exacerbate the 1 percent of global wetlands already being lost to human reclamation each year).

6. See Joy B. Zedler, *How Frequent Storms Affect Wetland Vegetation: A Preview of Climate-Change Impacts*, 8 FRONTIERS ECOLOGY & ENV'T 540, 542–43 (2010) (describing how extreme weather events can shape wetland vegetation).

7. Robert J. Nicholls, *Coastal Flooding and Wetland Loss in the 21st Century: Changes Under the SRES Climate and Socio-Economic Scenarios*, 14 GLOBAL ENVTL. CHANGE 69, 70–71 (2004) (stating that while flooding and sea-level rise will lead to greater loss of coastal wetlands, direct human causes are already destroying 1 percent per year).

agricultural use, for example, is a major driver of wetland loss,⁸ as is housing and commercial development.⁹ The dwindling number of wetlands stresses the need to protect them through mechanisms like the Clean Water Act.

II. CLEAN WATER ACT WETLAND PROTECTION FRAMEWORK

The Clean Water Act slows wetland conversion by prohibiting dumping material into wetlands without a valid permit. At the time the Act was passed, Congress found a permitting program (instead of imposing a complete ban on dumping) necessary because without one the country's extensive network of wetlands would prevent desired development.¹⁰ Congress felt that the public interest in development justified a certain level of water pollution. Thus, instead of prohibiting development outright, policy makers favored minimizing development's impacts on wetlands. To fill a wetland, a person must apply to the local Corps district office, which then consults with the EPA regional office. The Corps then either grants the permit (allowing the project to proceed), denies the permit, or issues a permit with conditions.

The Clean Water Act's protection of wetlands is limited in three ways. First, the statute only prohibits *filling* wetlands. It is not a comprehensive wetland protection statute and says nothing, for example, about draining wetlands.¹¹ Second, the statute only applies to "waters of the United States." A series of Supreme Court decisions has further limited the wetlands that fall under the statute's jurisdiction, excluding isolated wetlands from protection regardless of the ecological services and amenities they provide.¹² Finally, despite the strong prohibitory language of the statute, it does in fact allow

8. See John M. Hefner & James D. Brown, *Wetland Trends in the Southeastern United States*, 4 WETLANDS 1 (1985) (explaining that nearly all freshwater wetland losses in the Southeast could be attributed to conversion to agriculture).

9. See Stephen Faulkner, *Urbanization Impacts on the Structure and Function of Forested Wetlands*, 7 URB. ECOSYSTEMS 89, 90–91 (2004), available at http://conservation.ufl.edu/urbanforestry/Resources/PDF%20downloads/Faulkner_2004.pdf (detailing the importance of forested wetlands and their loss to urbanization, and noting that 1.2 million hectares of forested wetlands were lost in the United States from 1975 to 1997, but that generally the information on the loss of such natural resources is lacking).

10. Ambrose, *supra* note 3, at 4.

11. The complicated case law on earth-moving operations in wetlands leaves this area of the law muddy. It appears that deep-ripping and sidecasting (methods of moving dirt around and preparing soils for agriculture and development) require a permit, while incidental fallback (where small amounts of soil fall into a wetland during earth-moving activities) does not. Thus, some drainage activities may require a permit while other activities do not, and this boundary is tricky to determine. See Kim Diana Connolly, *Keeping Wetlands Wet: Are Existing Protections Enough?*, 6 VT. J. ENVTL. L. 169, 186–90 (2004–2005).

12. *Rapanos v. United States*, 547 U.S. 715, 759 (2006); see *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); see also ENVTL. PROT. AGENCY, POST-RAPANOS CASELAW (June 22, 2010), <http://water.epa.gov/lawsregs/guidance/wetlands/upload/Post-RapanosCaselaw.pdf> (listing cases that debate the definition and scope of the phrase, "waters of the United States," in light of the 2006 *Rapanos* decision).

filling of jurisdictional wetlands—it just requires developers to obtain a permit first.

A. *Mitigation Requirements: Avoidance, Minimization, Compensation*

A central feature of the wetlands permitting program is a requirement that permit holders mitigate the harm to wetlands caused by their project. Yet the Clean Water Act's permitting program did not originally involve mitigation. Initially, policy makers assumed that if a proposed project was likely to lead to ecosystem disruption, the permit would be denied.¹³ But concessions to politically popular programs undermined this initial assumption. Congress and the Corps reevaluated the permitting program to lessen the likelihood that the presence of wetlands would defeat development. The EPA and the Corps added mitigation requirements to their section 404(b)(1) guidelines in 1990.

The agencies defined mitigation as having three steps: avoidance, minimization, and compensation. To obtain permit approval, an applicant must first demonstrate that the project avoids adverse impacts to waters of the United States to the extent possible.¹⁴ Next, the applicant must minimize any remaining impacts of the proposed project.¹⁵ Finally, after the Corps is satisfied that the only remaining impacts are unavoidable (absent stopping the project), the Corps quantifies the project's damage to wetlands and may require project proponents to compensate for that damage through "compensatory mitigation."¹⁶

The section 404 mitigation scheme has some logical problems. To mitigate something means to reduce its impacts. Minimization and avoidance are thus really pre-mitigation measures. First, permit applicants should do all they can to *avoid* wetland impacts. Then they should do all they can to *minimize* any unavoidable impacts. Applicants should then *mitigate* the remaining unavoidable impacts. Thus, the only component of mitigation that is properly termed "mitigation" is compensation.

B. *Compensation Strategies*

The vast majority of section 404 permits come with conditions.¹⁷ To issue a permit with conditions, the Corps must assess whether the remaining unavoidable impacts are acceptable. This standard is met if the Corps believes

13. See Palmer Hough & Morgan Robertson, *Mitigation Under Section 404 of the Clean Water Act: Where It Comes From, What It Means*, 17 WETLANDS ECOLOGY & MGMT 15, 17 (2009) (explaining that "mitigation may not have initially been seen as a priority if it was assumed that permits for work which truly damaged wetlands would either be denied by the Corps or 'vetoed' by EPA under its Section 404(c) powers.").

14. 40 C.F.R. § 230.91(c)(2) (2014).

15. *Id.*

16. *Id.* § 230.91(c)(3).

17. *Final Individual Permits*, U.S. ARMY CORPS OF ENG'RS, <http://geo.usace.army.mil/egis/f?p=340:2:0::NO> (last visited Oct. 28, 2014) (listing permit issuance decisions since 2008 and revealing few if any permits that did not come with special conditions).

the benefits of the development project outweigh the harm to the wetland. Many permit conditions involve compensatory mitigation. According to Corps regulations, there are four acceptable compensatory mitigation strategies: establishment (or creation), restoration, enhancement, and preservation.¹⁸ These straightforward-sounding approaches can be challenging to implement. For example, establishment involves creating a wetland where one did not exist before.¹⁹ And wetland creation has been beset by a variety of problems with many failed projects.²⁰

Restoration and enhancement projects have largely fared better than creation projects, as understandings of restoration ecology are improving these projects' outcomes.²¹ Restoration and enhancement increase the function of an existing, potentially degraded wetland through activities like removing debris and invasive species, planting wetland species, and ensuring adequate water supplies. Yet restoration projects still provide fewer acres and fewer functions than ecologists predicted.²² After wetlands are created, restored, or enhanced, they are often encumbered with conservation easements in the hopes of preventing degradation or conversion.²³

18. § 230.93(a)(2).

19. See ALBERTA ENV'T, GUIDELINE FOR WETLAND ESTABLISHMENT ON RECLAIMED OIL SANDS LEASES (rev. 2007 ed.), available at <http://environment.gov.ab.ca/info/library/8105.pdf> (discussing various methods and issues concerning the development [or establishment] of wetlands throughout); INTERAGENCY WORKGROUP ON WETLAND RESTORATION, AN INTRODUCTION AND USER'S GUIDE TO WETLAND RESTORATION, CREATION, AND ENHANCEMENT 2, available at http://www.habitat.noaa.gov/pdf/pub_wetlands_restore_guide.pdf; C.C. Tanner, M.L. Nguyen & J.P.S. Sukias, *Nutrient Removal by a Constructed Wetland Treating Subsurface Drainage from Grazed Dairy Pasture*, 105 AGRIC., ECOSYSTEMS & ENV'T 145, 147, 159 (2005) (referring to the establishment period as when a new wetland takes root).

20. See William J. Mitsch & Renée F. Wilson, *Improving the Success of Wetland Creation and Restoration with Know-How, Time, and Self-Design*, 6 ECOLOGICAL APPLICATIONS 77, 78 (1996) (describing various critiques and concerns related to wetland creation and mitigation); Dennis F. Whigham, *Ecological Issues Related to Wetland Preservation, Restoration, Creation and Assessment*, 240 SCI. TOTAL ENV'T 31, 35 (1999) (explaining that wetland restoration projects often lack complete success because they do not "recognize that wetlands are part of larger landscapes," and asserting that "failures far outnumber successes"); Charlene D'Avanzo, *Long-term Evaluation of Wetland Creation Projects*, in WETLAND CREATION AND RESTORATION: THE STATUS OF THE SCIENCE, VOL. II 75, 75 (Jon A. Kusler & Mary E. Kentula eds., 1989) (stating that "a great many . . . artificial wetland projects are problematic or failures" and providing several reasons for failures, including "hydrology, erosion, herbivory, and invasion by upland plants").

21. See Anya Hopple & Christopher Craft, *Managed Disturbance Enhances Biodiversity of Restored Wetlands in the Agricultural Midwest*, 61P ECOLOGICAL ENGINEERING 505, 508–09 (2013) (describing recommendations regarding soil, hydrology, and vegetation that could improve wetland restoration projects); Zedler & Kercher, *supra* note 1, at 60 (explaining that restoration techniques are gradually improving while also indicating challenges); see also Robert H. Hilderbrand, Adam C. Watts & April M. Randle, *The Myths of Restoration Ecology*, 10 ECOLOGY & SOC'Y 1, 1 (2005) (noting that many restoration projects are "not successful either in structure or function when compared with reference ecosystems") (internal citations omitted).

22. See David Malakoff, *Restored Wetlands Flunk Real-World Test*, 280 SCIENCE 371 (1999) (noting some challenges associated with restoration projects but suggesting that, given enough time, the projects might end up being more successful than current projects have been).

23. See INTERAGENCY WORKGROUP, *supra* note 19, at 47.

The final option for compensatory mitigation is preservation, which involves protecting existing wetlands in exchange for permission to destroy other wetlands. Preservation on its own does not increase wetland function or acreage.²⁴ Instead, it accepts a decrease in both as justified by the benefits of the development project. The Corps works with the applicant to determine the acceptable ratio of destroyed versus protected wetlands. Preservation of wetlands can occur through fee simple ownership by private preservation organizations or government agencies or, more commonly, by burdening property with conservation easements or deed restrictions.

The Clean Water Act's language makes permit denial sound like a routine possibility, especially where projects would have significant impacts. Yet the program has not developed that way. Mitigation has become an important component of section 404's permitting program largely because of the Corps' and the EPA's reluctance to deny or veto permits. The Corps processes around sixty thousand permits annually,²⁵ and the agency rarely denies permits.²⁶ EPA vetoes are even rarer.

Section 404(c) authorizes the EPA to veto permits where the proposed activity will have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."²⁷ The EPA defines "unacceptable adverse effect" to mean an impact "likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas."²⁸ The EPA has only successfully exercised this authority thirteen times since 1972, with only two post-1990 vetoes.²⁹ The EPA's decisions not to veto Corps permits indicate that the EPA finds most of the adverse effects to be "acceptable." Because permit applicants largely get permission to fill wetlands, imposing mitigation requirements is the least the Corps can do.

III. PRESERVATION PROGRAMS

After several years of section 404 program operation, multiple studies evaluated the success of the program for protecting wetlands.³⁰ The report card was not a good one. Reports indicated that mitigation sites were often highly

24. Indeed, for this reason it is the Corps' least preferred method of compensation.

25. ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 404(C) "VETO AUTHORITY," <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf> (last visited Oct. 25, 2014).

26. See Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607, 644 (2004); Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 782 (1989).

27. 33 U.S.C. § 1344(c) (2012).

28. 40 C.F.R. § 231.2(e) (2014).

29. ENVTL. PROT. AGENCY, *supra* note 25.

30. See Rebecca L. Kihlslinger, *Success of Wetland Mitigation Projects*, 30 NAT'L WETLANDS NEWSL. 14 (2008), available at <http://www.wetlandsnewsletter.org/pdf/30.02/kihlslinger.pdf> (reviewing studies of compensatory mitigation projects).

degraded.³¹ This information came down as developers were pushing for a more streamlined process. This led the George H.W. Bush administration to declare a policy of “No Net Loss of Wetlands” in 1989.³² The Bush Administration blamed the failures of wetland protection on command-and-control regulations and strongly promoted the adoption of market-based incentives, like mitigation banks.³³ Although the no net loss policy originally sought to maintain wetland acreage, that approach was unsuccessful.³⁴ Today, the goal seems to be to maintain wetland function, and the struggle to fulfill that policy goal remains.³⁵

Preservation as a mitigation strategy is particularly hard to accept in association with the federal no net loss of wetlands policy. The Corps has long noted that preservation, when implemented alone, is the least favored mitigation strategy (although the Corps does endorse preservation of restored, enhanced, and created wetlands) and should only be undertaken in “exceptional circumstances.”³⁶ Preserved wetlands can qualify as compensatory mitigation when they “(1) perform physical or biological functions, the preservation of which is important to the region in which the aquatic resources are located, and (2) are under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted.”³⁷ The Corps’ reluctance to promote preservation alone is reflected in the fact that pure preservation mitigation banks do not yield as many wetland conversion credits.³⁸

In some cases, preservation may protect wetlands that might have otherwise been lost to agricultural conversion or development. For example, a permittee could protect non-jurisdictional wetlands threatened by development. The Clean Water Act’s limited jurisdiction means that it cannot directly protect

31. See, e.g., Shelley Burgin, ‘Mitigation Banks’ for Wetland Conservation: A Major Success or an Unmitigated Disaster? 18 WETLANDS ECOLOGY & MGMT 49, 51 (2010) (describing inadequacies in wetland mitigation projects); Tammy Hill, et al., *Compensatory Stream and Wetland Mitigation in North Carolina: An Evaluation of Regulatory Success* 51 ENVTL. MGMT 1077, 1084 (finding lower success rates for recently constructed wetland mitigation projects compared to projects from before 2002); Elizabeth A. Hunter, et al., *Improving Wetland Mitigation Site Identification Through Community Distribution Modeling and a Patch-Based Ranking Scheme*, 32 WETLANDS 841, 841–42 (2012) (suggesting wetland mitigation projects may be unsuccessful because they fail to plan at the watershed scale).

32. Renee Stone, *Wetlands Protection and Development: The Advantages of Retaining Federal Control*, 10 STAN. ENVTL. L.J. 137, 143 (1991) (describing Bush’s announcement of the policy at a Ducks Unlimited event); Morgan M. Robertson, *The Neoliberalization of Ecosystem Services: Wetland Mitigation Banking and Problems in Environmental Governance*, 35 GEOFORUM, 361, 363 (2004).

33. Robertson, *supra* note 32, at 363.

34. Kihlslinger, *supra* note 30, at 16.

35. See R. Eugene Turner, Ann M. Redmond, & Joy B. Zedler, *Count It by Acre or Function—Mitigation Adds Up to Net Loss of Wetlands*, 23 NAT’L WETLANDS NEWSL. 5, 5 (2001).

36. Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605, 58,606 (Nov. 28, 1995), available at <http://www.gpo.gov/fdsys/pkg/FR-1995-11-28/pdf/95-28907.pdf>.

37. *Id.* at 58,609.

38. See *id.*

such areas, so covering them by compensatory mitigation programs may yield a conservation benefit even if it still represents a net loss of wetlands. Nothing requires compensatory mitigation wetlands to be jurisdictional.³⁹ Arguably, protected wetlands should be in the same watershed (or as some mitigation requirements state, in the same “service area”) and part of the same hydrological system.⁴⁰ A geographical or hydrological connection would explain how the protection of such wetlands might mitigate the harm caused by neighboring wetland conversion.⁴¹

IV. CONSERVATION EASEMENTS

Most wetland mitigation projects involve conservation easements. Conservation easements are an essential tool when using preservation as a mitigation strategy, and they can prevent conversion of wetlands that have been enhanced, created, or restored. Most conservation easement statutes and programs appear to assume conservation easements are created through donations and purchases. However, increasingly, conservation easements are emerging in permitting programs like the Clean Water Act’s section 404 program.⁴² In exchange for wetland discharge permits, permit applicants undertake compensatory mitigation that often involves conservation easements.

Conservation easements come into play with most section 404 mitigation plans. The goal of any type of mitigation is to keep the restored, enhanced, created, or preserved wetland a thriving wetland forever.⁴³ Placing conservation easements over the wetlands enables the prohibition on wetland conversion to remain on the land with subsequent changes in landownership. The conservation easement restrictions are recorded with the deed and appear in title searches. When this works properly, new landowners take ownership of the property with the understanding that the wetlands on the property must be

39. The no net loss of wetlands policy did not say no net loss of *jurisdictional* wetlands.

40. Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,674 (Apr. 10, 2008) (describing the importance of hydrological function in evaluation of compensatory mitigation projects).

41. How we characterize the benefits of wetland protection from these preservation schemes depends on what we use as our baseline or point of comparison. Do we ask what level of wetland conservation would result without the protections of the Clean Water Act, or do we consider what level of conservation we would get with a complete prohibition on wetland degradation? Most analyses seem to consider the former, then chalk up any prohibited or limited project as a success, regardless of the actual wetlands converted in the process.

42. See generally Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043 (2006). Conservation easements may also be created by condemnation or judicial proceedings, but to date this has been rare.

43. Such a goal, particularly in light of climate change implications, is questionable. See Jessica Owley, *Property Constructs and Nature’s Challenge to Perpetuity*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 64 (Keith Hirokawa ed., 2014); Adena R. Rissman et al., *Adapting Conservation Easements to Climate Change*, CONSERVATION LETTERS (May 1, 2014), available at <http://www.landtrustalliance.org/climate-change-toolkit/adapting-conservation-easements-to-climate-change>.

preserved in perpetuity.⁴⁴ Where mitigation banks⁴⁵ play a role in mitigation, state law may require conservation easements to burden the banked land.⁴⁶

Despite the important role of conservation easements in section 404 compensatory mitigation, there are no regulations or agency guidance regarding conservation easements. Some individual offices have developed templates, but these templates are not based on any specific agency policies and have not been subject to external public review.⁴⁷ Even documents like the federal mitigation banking guidelines only indicate that conservation easements can provide the needed perpetual restriction on property and give no further detail regarding the terms or holders of the conservation easements.⁴⁸

Section 404 conservation easements can be held by either a government agency or a land trust. Although the Corps is a qualified holder under most state laws,⁴⁹ it cannot hold conservation easements because it has not been granted that ability by Congress. Many section 404 conservation easements are

44. Of course, this does not always work properly, and the stories of landowners being unaware of (or failing to understand) conservation easements burdening their property are more common than we would like. *See, e.g.,* *Feduniak v. Cal. Coastal Comm'n*, 56 Cal. Rptr. 3d 591, 597 (Ct. App. 2007) (discussing how landowners were unaware of native landscaping and botanic easements on their property despite a diligent title search).

45. Wetland mitigation banks are wetland conservation sites “designed to offset residual, unavoidable damage to the natural environment cause by development activities.” Burgin, *supra* note 31, at 49. In many cases, these are sites where entrepreneurs restore and protect a wetland, then sell credits to developers who need to compensate for their projects’ harm to other wetlands. *Id.* at 49–50.

46. *See* CAL. DEP’T OF FISH & WILDLIFE, CONSERVATION AND MITIGATION BANKING GUIDELINES 5 (2014), *available at* <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=79095&inline=1>.

47. *Compare* U.S. Army Corps of Eng’rs, Model Conservation Easement for the Wilmington, NC District Office (rev’d Aug. 2003) http://www.saw.usace.army.mil/Portals/59/docs/regulatory/regdocs/Mitigation/conservation_easement_r8-03.pdf, *with* U.S. Army Corps of Eng’rs, Model Conservation Easement for the Mobile, AL District Office, *available at* <http://www.sam.usace.army.mil/Portals/46/docs/regulatory/docs/Restrictive%20Cov/Model%20Conservation%20Easement%20for%20Individual%20Permits.pdf> (last visited Oct. 25, 2014). These two model conservation easements from different Corps offices in the Southeastern United States have many differences. For example, the Wilmington office has more outright prohibitions, while the Mobile office allows modifications on prohibitions with prior approval.

48. *See* 60 Fed. Reg. 58,605, 58,613 (Nov. 28, 1995). Some states have their own laws that apply to mitigation banks, and some state agencies provide guidelines and/or templates for mitigation banking conservation easements. *See, e.g.,* Template for Mitigation and Conservation Banks in California (Mar. 2010), *available at* <http://www.spd.usace.army.mil/Portals/13/docs/regulatory/banking/CE.pdf>.

49. Arguably, section 404 conservation easements may not even need to follow state law. *See* *United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974) (holding that conservation easements negotiated and held by the U.S. Fish & Wildlife Service did not have to conform to state law prohibiting perpetual conservation easements because they were part of a federal scheme). Further, some courts might uphold exactions precisely because they are exactions. *See, e.g.,* *Rosco Holdings, Inc. v. State*, 260 Cal. Rptr. 736, 742–43 (Ct. App. 1989) (holding that a landowner could not challenge a condition imposed on the granting of a permit after acquiescence to the condition). *But see* *Trancas Prop. Owners Ass’n v. City of Malibu*, 34 Cal. Rptr. 3d 334 (Ct. App. 2005) (holding that exactions must comply with state property law); Jessica Owley, *Exacting Conservation Easements in California*, 21 ENVTL. L. NEWS 3 (Winter 2012).

held by land trusts like Ducks Unlimited.⁵⁰ Accountability concerns surround the use of conservation easements. When the conservation easement holders are land trusts, these concerns are magnified and accompanied by additional privatization concerns. In particular, land trusts exacerbate problems around the shaping of conservation easement terms and the need for stewardship and enforcement.

A. *Shaping Conservation Easement Terms*

Without official agency guidance, each Corps office is left to adopt its own strategy regarding conservation easements. Many offices play an integral role in crafting conservation easement language, and some offices develop model conservation easements. Without agency guidance or unified model conservation easements, land trusts have a heavy hand in shaping the agreements, giving rise to concerns that private organizations are determining section 404 mitigation measures.⁵¹

When a land trust negotiates the conservation easement instrument, it may have the ability to dictate terms regarding restrictions and amendment or termination.⁵² Thus, the land trust, not the Corps, establishes what can and cannot happen on the land. Some conservation easements even allow for changes to the agreement with written consent of the conservation easement holder. Conservation easements that contain such language allow private organizations the opportunity to make changes on mitigation lands without public oversight or Corps approval.

Lack of public oversight is a concern for all section 404 conservation easements, regardless of holder. There is a public notice and comment process for section 404 permits, and mitigation plans often garner the most comments. Yet the permit review process does not usually include a review of the terms of the conservation easement. Often, the conservation easements are not established until after the permit is issued. The permit will include the required mitigation without detailing conservation easement terms or even stating the exact location of conservation easements involved.

Use of a mitigation bank partially alleviates these democracy concerns. The guidance for mitigation banking is more extensive and does include sample

50. See *Conservation Easement Program*, DUCKS UNLIMITED, <http://www.ducks.org/conservation/land-protection/conservation-easements> (last visited Oct. 25, 2014).

51. Of course, some place more faith in land trusts than in the Army Corps. The Army Corps of Engineers district offices sometimes have bad reputations with conservationists and developers alike. See Robert Haskell Abrams, *Water Federalism and the Army Corps of Engineers' Role in Eastern States Water Allocation*, 31 U. ARK. LITTLE ROCK L.REV. 395 (2009).

52. Although the Corps issues the permit, it may simply require a certain acreage of wetlands protected by a conservation easement without dictating the terms. The permit applicant is then responsible for negotiating a conservation easement with the land trust (a conservation easement that may burden the applicant's land or may be purchased on other land).

conservation easement language.⁵³ But that does not guarantee that the conservation easement involved will be reviewed. Mitigation banking agreements are subject to public review, but the long list of banking instrument components reviewed during that process does not include conservation easements.⁵⁴ Banks sometimes do include conservation easements under the requirements for addressing provisions for long-term management and maintenance.⁵⁵ Where mitigation banks are in place in advance of the granting of permits, the public may have some opportunity to view the site and track down the conservation easements before permit issuance.

B. Stewardship and Enforcement

Compliance with mitigation requirements is essential to a successful mitigation program that provides long-term protection of ecosystem services. Ensuring compliance with mitigation requirements involves a continued commitment to stewardship. It requires monitoring parcels, managing ecosystem health, and, perhaps most importantly, enforcing conservation easements.⁵⁶

Evaluations suggest current enforcement strategies are inadequate because of a lack of compliance with permit conditions. A 2007 study showed that permittees only met 73 percent of permit conditions.⁵⁷ Some regions have had particular trouble. For example, a 2002 New Jersey study revealed that mitigation projects only met “[48] percent of design requirements and permit specifications.”⁵⁸ Monitoring and long-term maintenance seem to be especially problematic, as several studies have cataloged monitoring deficiencies.⁵⁹ And while 2008 regulation changes may have improved permit compliance in some respects, wetland mitigation is still beset by problems.⁶⁰

53. See Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58,605, 58,609–10 (Nov. 28, 1995), available at <http://www.gpo.gov/fdsys/pkg/FR-1995-11-28/pdf/95-28907.pdf>.

54. *Id.*

55. *Id.* at 58,612.

56. An even more complicating discussion is determining what should be done when the impacts of climatic change or disasters mean that a protected wetland is no longer viable. This raises hard questions both for section 404 mitigation requirements and for laws governing conservation easements generally. See, e.g., Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 LAW & CONTEMP. PROBS. 199 (2011).

57. RICHARD F. AMBROSE, JOHN C. CALLAWAY & STEVEN F. LEE, AN EVALUATION OF COMPENSATORY MITIGATION PROJECTS PERMITTED UNDER THE CLEAN WATER ACT SECTION 401 BY THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, 1991–2002 at 40 (2007), available at http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/mitigation_finalreport_full081307.pdf; see also Kihlslinger, *supra* note 30, at 14 (describing the results of Ambrose et al. and other studies).

58. Kihlslinger, *supra* note 30, at 14 (citing a study by Balzano et al.).

59. Ambrose, *supra* note 4, at 15, 22.

60. See Diane De Steven, Rebecca R. Sharitz & Christopher D. Barton, *Ecological Outcomes and Evaluation of Success in Passively Restored Southeastern Depressional Wetlands*, 30 WETLANDS 1129, 1138 (2010).

In many cases, the Corps has turned responsibility for stewardship functions like compliance enforcement over to land trusts and private companies. As holders of conservation easements, land trusts not only play an important role in shaping the terms and conditions of the agreements but also determine whether the agreements will be enforced. In many cases, conservation easement holders are the only ones with the ability to enforce the agreements, and there is a lack of consensus on whether land trusts have a duty (as opposed to just a right) to enforce them.

The argument in favor of a land trust duty to enforce is strong.⁶¹ Although conservation easement language does not require enforcement, and state conservation easement law is largely silent on the subject, a land trust's status as a charitable organization may establish an obligation. Charitable organizations are prohibited from creating private benefits. Where a land trust terminates or modifies a conservation easement, it may not do so in a way that inures private benefit to the landowner or another. Arguably, a decision not to enforce a conservation easement would also give a landowner a significant private benefit, but courts have yet to address this point. Without compensation from the landowner, the land trust could risk the state attorney general's office revoking the land trust's charter. Furthermore, if a land trust fails to comply with its charter to protect land, it could also face dissolution by the attorney general. Similar behavior could also jeopardize an organization's federal 501(c)(3) favorable tax status.

Of course, such repercussions depend upon whether the state attorney general offices or the IRS chooses to pursue the matter. The remedy for lack of stewardship of conservation easements is unclear. The clear threats are to the organization, possibly leading to a loss of 501(c)(3) status or loss of an organization's charter. In many states, this would lead to a transfer of the conservation easements to another organization. Actions against the land trust, however, do not lead automatically to the preferred remedy of injunctive relief against the conservation easement violation.

None of the above-described actions involve the permit applicant, who is often no longer associated with mitigation measures when enforcement is necessary. Sometimes it is difficult to determine whether the conservation easement even arose from a permitting program. Some conservation easements specifically mention the wetlands permit that they are associated with, but many do not. Some do not even mention the Clean Water Act or indicate that they are part of a compensatory mitigation scheme.

To remedy this lack of information and subsequent lack of enforcement, all Corps offices should adopt the identification method used by the Corps district offices that have model conservation easements. This method requires specifically identifying the conservation easement's origin, either generally as

61. In fact, it may be easier to demonstrate a duty for land trusts, rather than state agencies, to enforce conservation easements. State agencies can generally argue that they are exercising their prosecutorial discretion not to pursue violations of conservation easements.

part of a section 404 permitting scheme or, better yet, naming the individual permit. A further step is to attach the permit to the conservation easement. Including this information about a conservation easement's origin enables courts and others to understand the role the conservation easement played—that it resulted from wetland degradation and not simply a family donation. This information will be helpful if the conservation easement is ever challenged in court and if amendments are contemplated.

The Corps should also include itself as a third-party enforcer. Most states allow third-party enforcement of conservation easements (although the Corps may be able to include such a provision even if it conflicts with state conservation easement laws because the conservation easement is part of a federal scheme).⁶² By establishing itself as a third-party enforcer, the Corps can remain involved throughout the life of a conservation easement and step in if a holder seems uninterested in, or incapable of, carrying out enforcement or other stewardship duties. The Corps does sometimes require third-party enforcer status for conservation easements associated with mitigation banks, and extending that practice to all section 404 conservation easements is good policy.⁶³

CONCLUSION

The Clean Water Act contains inconsistencies. It is a statute that declares its policy to be the elimination of all discharges into the nation's waters but then proceeds to explain how to discharge pollutants into navigable waters. While the Clean Water Act has done much to prevent pollution, its chief function appears to be to facilitate pollution. A similar juxtaposition exists for the Clean Water Act's attitude toward wetlands. The statute appears to prevent filling wetlands but then explains how to obtain a permit to fill wetlands in section 404. To reconcile the Clean Water Act's goals with its operation, the Executive Branch established a policy of no net loss of wetlands. Despite endorsement by each administration since George H.W. Bush announced the policy, the goal has not been realized. Instead, mechanisms throughout the legal process enable conversion of wetlands.

Protecting wetlands while allowing for growth and development presents a hard problem. And environmental challenges like climate change and water quality degradation only make the problem harder. Faced with this onerous task, the Corps is drawing upon the strengths of private organizations like land trusts. Land trusts play a key role in mitigation programs, particularly those

62. See Turner, Redmond & Zedler, *supra* note 35, at 15.

63. See Davis Urban, Director of Operations, Ecosystem Investment Partners, Michael Dennis, Counsel, Ecosystem Investment Partners, Richard Martin, Director of Forest Protection & Management, The Nature Conservancy, Land Trust Alliance, Land Trusts' Interaction with Mitigation Banking: A Perspective from Both Sides (Oct. 2, 2012) (Workshop Handouts on file with author and available through the Land Trust Alliance) (presenters explaining that they sometimes had Corps third-party enforcement rights in conservation easements burdening private mitigation banks).

relying upon preservation as a compensatory mitigation technique. As a threshold, the Corps should eliminate its use of preservation as a sole mitigation strategy, even where that might mean denying permits. The Corps already recognizes that preservation is the least-favored mitigation strategy because resulting wetland loss makes it hard to assert that wetlands have been protected. And when preservation programs are used, the Corps should be more systematic by promulgating regulations or issuing guidance regarding the use of conservation easements and the role of land trusts. Land trusts can increase wetland protection, but the Corps must be careful to remain involved with mitigation projects and work to bring public oversight into the creation and long-term stewardship of these projects. In short, the Corps must find a careful balance between harnessing private power and abdicating public responsibility.